

(2023) 07 CAL CK 0060

In the Calcutta High Court

Case No : FMA No. 382 Of 2022, COT No. 9 Of 2022

ICICI Lombard General Insurance Co. Ltd.

APPELLANT

Vs

Jagannath Ojha & Anr.

RESPONDENT

Date of Decision : 11-07-2023

Acts Referred:

Motor Vehicles Act, 1988 — Section 166

Citation : (2023) 07 CAL CK 0060

Hon'ble Judges : Bivas Pattanayak, J

Bench : Single Bench

Advocate : Parimal Kumar Pahari, Subir Banerjee, Sandip Bandyopadhyay, Ruxmini Basu Roy

Final Decision : Disposed Of

Judgement

Bivas Pattanayak, J

1. This appeal is preferred against the judgment and award dated 30th March, 2021 passed by learned Judge, Motor Accident Claims Tribunal, Fast Track, 1st Court, Contai, Purba Medinipur in M.A.C. Case No. 2 of 2015 granting compensation of Rs. 14,03,114/- together with interest in favour of the claimant under Section 166 of the Motor Vehicles Act, 1988.

2. The brief fact of the case is that on 4th November, 2014 at about 12:30 hours while the victim was sitting on his stationed motor cycle bearing registration no. WB-32F/4697 and was talking with a person besides Contai-Mecheda pitch road near Hena Oil (Fuel) Pump, at that time, the offending vehicle bearing registration no. WB-32D/2470 (motor cycle) in a rash and negligent manner moving from Contai to Marishda lost control and dashed backside of the motor cycle of the victim. As a result, the victim sustained serious injuries all over his body and thereafter became disabled. On account of such injuries and the subsequent disablement, the claimant-injured filed application for compensation of Rs. 25,00,000/-together with interest under Section 166 of the Motor Vehicles

Act, 1988.

3. The claimant-injured, in order to establish his case, examined seven witnesses including himself and produced documents which have been marked as Exhibits 1 to 31 respectively.

4. The appellant-insurance company did not adduce any evidence

5. Respondent no. 2, owner of the offending vehicle, did not contest the claim application and the case was dismissed ex parte against him.

6. By order dated 17th August, 2022, service of notice of appeal upon respondent no. 2 was dispensed with.

7. Upon considering the materials on record and the evidence adduced on behalf of the claimant-injured, learned Tribunal granted compensation of Rs.14,03,114/- together with interest in favour of the claimant.

8. Being aggrieved by and dissatisfied with the impugned judgment and award, the insurance company has preferred the present appeal.

9. Challenging the impugned award, the claimant-injured has also filed a cross-objection being COT 9 of 2022.

10. Both the appeal as well as the cross-objection is taken up together for consideration and disposal.

11. Mr. Parimal Kumar Pahari, learned advocate for the appellant-insurance company, submitted that the claimant-injured has failed to prove his monthly income by producing cogent evidence. However, learned Tribunal without proper assessment of evidence on record erroneously determined the income of Rs. 5,000/- as the monthly income of the victim. The accident having taken place in the year 2014 and bearing in mind catena of decisions of this Court, an income of Rs. 4,000/- per month of the victim would be reasonable.

Furthermore he submitted that the disability certificate has not been proved in accordance with law by examining the doctors who issued the same and this needs to be discounted for it being inadmissible.

He further submitted that none of the doctors, who treated the injured or issued disability certificate, has been examined by the claimant-injured to establish his extent of injury. Moreover, though the disablement certificate clearly indicates that the victim sustained 80% temporary disablement yet the learned Tribunal held that the victim sustained permanent disablement which is an error apparent. Furthermore, there is no evidence on record to suggest that the victim, due to such injuries, was incapable of performing his regular job or the injuries has resulted in loss of earning capacity.

He further submitted that the claimant-victim has failed to prove the medical expenses of Rs. 5,82,114/- and the learned Tribunal erred in accepting such medical expenses.

In light of his aforesaid submissions, he prayed for setting aside the impugned judgment and award.

12. In reply to the aforesaid contentions raised on behalf of the appellant-insurance company, Mr. Subir Banerjee, learned advocate for respondent-claimant, submitted that it is the specific case of the claimant that, at the time of accident, he was a mason by profession and used to earn Rs.6,000/- per month and in support of such assertion, the claimant has adduced his evidence. Referring to the decision of Hon'ble Supreme Court passed in Syed Sadiq and Others versus Divisional Manager, United India Insurance Company Limited reported in (2014) 2 SCC 735 and another decision of this Court in The Oriental Insurance Co. Ltd. versus Mst. Abeda Bibi & Ors. reported in (2017) 6 WBLR (Cal) 69, he submitted that in an unorganised sector it is not possible to produce documents of income and oral evidence in such circumstances is to be accepted for determination of income. He submitted that considering the economic factors prevailing at the relevant point of time an income of Rs.6,000/- per month of the victim should be taken into account as claimed.

Furthermore the disability certificate has been proved by one lower division clerk of Contai Sub-Divisional Hospital who filled up the disability certificate and the same has been exhibited without objection and thus is very much admissible in evidence.

He further submitted that the medical evidence on record shows physical disablement of 80% but bearing in mind the avocation of the claimant, the functional disablement is 100% which the learned Tribunal has failed to take into account.

He further submitted that since, at the time of accident, the victim was 22 years old, hence the multiplier should be 18 instead of 17 adopted by the learned Tribunal.

Relying on the decision of the Hon'ble Supreme Court passed in Laxman Alias Laxman Mourya versus Divisional Manager, Oriental Insurance Company Limited and Another reported in (2011) 10 SCC 756, he submitted that, bearing in mind the injuries sustained by the victim, an amount of Rs. 2,00,000/- should be allowed in his favour towards future medical expenditures.

He further submitted that the claimant is entitled to future prospect which has not been taken into account by the learned Tribunal while granting compensation in view of decision of Hon'ble Supreme Court passed in National Insurance Company Limited versus Pranay Sethi and Others reported in (2017) 16 SCC 680.

In light of his aforesaid submissions, he prayed for enhancement of the compensation amount.

13. Having heard learned advocates for the respective parties, following issues have fallen for consideration:

Firstly, whether the learned Tribunal erred in determining the income of the victim.

Secondly, whether the disability certificate is inadmissible in the absence of evidence of issuing doctor.

Thirdly, whether the disablement of the victim is permanent in nature resulting in loss of earning capacity to the extent of 100%. Fourthly, whether the victim is entitled to medical expenses.

Fifthly, whether the multiplier should be 18 instead of 17.

Sixthly, whether the claimant is entitled to future prospect.

And lastly, whether the victim is entitled to future medical expenditures of Rs.2,00,000/-.

14. With regard to the first issue relating to determination of income, it is found that the learned Tribunal has considered the monthly income of the victim of Rs.5,000/-. The claimant, in his application for compensation, has claimed his monthly income to be Rs. 6,000/- by working as a mason. In his evidence-in-chief, the victim (PW1) deposed that he used to earn Rs.6,000/- per month by working as a mason. Mr. Banerjee, learned advocate for the respondent no.1-claimant, strenuously argued referring to Syed Sadiq (supra) and Mst. Abeda Bibi (supra) that since the victim was working in unorganised sector it was not possible for him to produce documentary evidence and as such the oral evidence should be accepted. Per contra, Mr. Pahari, learned advocate for the appellant-insurance company, has pressed into service that following catena of decisions of this Court, since the accident has taken place in the year 2014, the income of the victim at best should be considered at Rs.4,000/- per month. So far as the decision in Syed Sadiq (supra) is concerned, the victim in the said case was engaged in vegetable vending and considering the rising prices in agricultural product, the Hon'ble Court held that the vegetable vendor has capacity to earn Rs. 6,500/- per month. Whereas in the case at hand, the victim is a mason by profession. In Mst. Abeda Bibi (supra), the deceased was a vegetable seller and following the proposition in Syed Sadiq (supra), this Court considered the income of the victim of Rs. 5,000/-. It is true that, in the case at hand, the victim was related to an unorganised sector, so it was quite impossible for the claimant-victim to prove his income by supporting document. Now it is to examine whether the monthly income of Rs.5,000/- of the claimant-injured determined by the learned tribunal is reasonable. The income of Rs.6,000/- per month of the victim by working as mason appears to be exorbitant. In the case of Sri Ramachandrappa versus The Manager, Royal Sundaram Alliance Insurance Company Limited reported in (2011) 13 SCC 236 the Hon'ble Supreme Court observed as follows:

"14. . . . We hasten to add that in all cases and in all circumstances, the Tribunal need not accept the claim of the claimant in the absence of supporting material.

It depends on the facts of each case. In a given case, if the claim made is so exorbitant or if the claim made is contrary to the ground realities, the Tribunal may not accept the claim and may proceed to determine the possible income by resorting to some guesswork, which may include the ground realities prevailing at the relevant point of time. . . .”

Bearing in mind the aforesaid observation of Hon’ble Court and also considering that the victim-claimant was a mason by profession and taking into account the economic factors including cost of essential commodities prevailing in the year 2014 when the accident has taken place, it is found that the monthly income of Rs. 5,000/- of the claimant-injured arrived at by learned Tribunal is reasonable and does not call for interference.

15. With regard to the second issue pertaining to the veracity and admissibility of disability certificate, Mr. Pahari, learned advocate for appellant-insurance company, has strenuously argued that since doctor who issued the disability certificate has not been examined, hence such certificate is inadmissible. Per contra, Mr. Banerjee, learned advocate for respondent no.1-claimant, has pressed that the document being not objected to is admissible. It is found that the claimant has examined one lower division clerk of Contai Sub-Divisional Hospital namely, Mir Alamgir as P.W.4 who under authority of Superintendent of Contai Sub-Divisional Hospital produced the certified copy of handicap register marked Exhibit-21 and he also deposed that he filled up the disability certificate and he identified the signatures of the doctors who issued the disability certificate. The disability certificate was marked as Exhibit-22. From the cross-examination, it is found that, at the time of issuance of disability certificate, this witness was present. From the evidence of this witness, it is found that the handicap register and the disability certificate have been exhibited on behalf of the claimant without any objection being raised from the side of the insurance company. That apart, upon going through the cross-examination of this witness, there is nothing in the evidence to suggest that such document of disability was ever challenged or objected to at the time of cross-examination of this witness by the insurance company. To be precise, no suggestion whatsoever has been given to the witness challenging the veracity of the said document. It is now settled law that if a document is marked as exhibit on consent without reservation the contents are not only evidence but are taken as admitted. In the case at hand, even if for the sake of argument it is held that the disability certificate has been exhibited not on consent but on formal proof dispensed with, the insurance company was free to examine the witness on the question of veracity thereof or even lead evidence of rebuttal. The insurance company, in the present case, has not led any evidence challenging the veracity of the disability certificate produced at the instance of the appellant-claimant, therefore, having failed to take appropriate steps at the trial, the insurance company cannot contend before the Appellate Court that the contents of those documents were not proved. If such objection was raised at the trial, the appellant-claimant could even examine the doctor who issued the certificate so that he could face the

cross-examination of the insurance company. Thus, the argument advanced on behalf of the insurance company falls short of merit. For the aforesaid reason, the disability certificate is acceptable and can be taken into consideration.

16. The third issue involved in the present appeal is whether the disablement of the victim is permanent in nature resulting in loss of earning capacity to the extent of 100%. In order to appreciate this issue it would be apposite to refer to the principles laid down by the Hon'ble Supreme Court in the decision of Raj Kumar versus Ajay Kumar & Anr. reported in (2011) 1 SCC 343 which is reproduced hereunder:

"12. Therefore, the Tribunal has to first decide whether there is any permanent disability and if so the extent of such permanent disability. This means that the tribunal should consider and decide with reference to the evidence: (i) whether the disablement is permanent or temporary; (ii) if the disablement is permanent, whether it is permanent total disablement or permanent partial disablement, (iii) if the disablement percentage is expressed with reference to any specific limb, then the effect of such disablement of the limb on the functioning of the entire body, that is the permanent disability suffered by the person. If the Tribunal concludes that there is no permanent disability then there is no question of proceeding further and determining the loss of future earning capacity. But if the Tribunal concludes that there is permanent disability then it will proceed to ascertain its extent. After the Tribunal ascertains the actual extent of permanent disability of the claimant based on the medical evidence, it has to determine whether such permanent disability has affected or will affect his earning capacity.

13. Ascertainment of the effect of the permanent disability on the actual earning capacity involves three steps. The Tribunal has to first ascertain what activities the claimant could carry on in spite of the permanent disability and what he could not do as a result of the permanent disability (this is also relevant for awarding compensation under the head of loss of amenities of life). The second step is to ascertain his avocation, profession and nature of work before the accident, as also his age. The third step is to find out whether (i) the claimant is totally disabled from earning any kind of livelihood, or (ii) whether in spite of the permanent disability, the claimant could still effectively carry on the activities and functions, which he was earlier carrying on, or (iii) whether he was prevented or restricted from discharging his previous activities and functions, but could carry on some other or lesser scale of activities and functions so that he continues to earn or can continue to earn his livelihood.

14. For example, if the left hand of a claimant is amputated, the permanent physical or functional disablement may be assessed around 60%. If the claimant was a driver or a carpenter, the actual loss of earning capacity may virtually be hundred percent, if he is neither able to drive or do carpentry. On the other hand, if the claimant was a clerk in government service, the loss of his left hand may not result in loss of employment and he may still be continued as a clerk as he could perform his clerical functions; and in that event the loss of earning

capacity will not be 100% as in the case of a driver or carpenter, nor 60% which is the actual physical disability, but far less. In fact, there may not be any need to award any compensation under the head of 'loss of future earnings', if the claimant continues in government service, though he may be awarded compensation under the head of loss of amenities as a consequence of losing his hand. Sometimes the injured claimant may be continued in service, but may not found suitable for discharging the duties attached to the post or job which he was earlier holding, on account of his disability, and may therefore be shifted to some other suitable but lesser post with lesser emoluments, in which case there should be a limited award under the head of loss of future earning capacity, taking note of the reduced earning capacity.

15. It may be noted that when compensation is awarded by treating the loss of future earning capacity as 100% (or even anything more than 50%), the need to award compensation separately under the head of loss of amenities or loss of expectation of life may disappear and as a result, only a token or nominal amount may have to be awarded under the head of loss of amenities or loss of expectation of life, as otherwise there may be a duplication in the award of compensation....."

Bearing in mind the aforesaid principles laid down by the Hon'ble Supreme Court, let me first decide whether the victim sustained any permanent disability due to the accident and, if so, to what extent. The victim in his claim application at column 11 stated that he sustained serious injuries all over the body mainly head, fracture on left forearm. Referral card (Exhibit-3) shows that the victim sustained head injury. Discharge summary (Exhibit-5) dated 29th November, 2014 of National Neurosciences Centre Calcutta shows that upon investigation following injuries are revealed:

"INVESTIGATIONS:

CT scan of brain showed multiple scattered small contusions in both hemisphere and also in the brain stem. There was no cisternal effacement of midline shift.

X ray of left forearm revealed a fracture of the ulna and fracture of metacarpals.

Other investigations outlined below."

The final diagnosis shows that the victim suffered from diffuse axonal injury. Thus, the injuries stated in the claim application are reflected in the discharge summary. The victim for better treatment had been to Hi-Tech Medical College & Hospital, Bhubaneswar, National Institute of Mental Health & Neuro Sciences, Bangalore and St. John's Medical College Hospital, Bangalore. All the medical documents of the aforesaid Medical Institutes show that the victim suffered from diffuse axonal injury. The disability certificate of the victim (Exhibit-22) shows that the victim sustained 80% disablement. In the disablement certificate (Exhibit-22), it is revealed that the Board has noted that the victim suffered from diffuse axonal injury and CT scan shows gliosis of both frontal and temporal lobe.

Diffuse axonal injury relates to shearing (tearing) of the brain's long connecting nerve fibers (axons) that happens when the brain is injured as it shifts and rotates inside the bony skull. Such injury has a range of multiple neurological deficits that affect the physical and mental status of the patient. There is no evidence that the injured had fully recovered from such injury. Bearing in mind the aforesaid, it goes without saying, in the absence of contrary evidence, that the injury of the victim is of permanent nature. It has been strenuously pressed into service on behalf of the respondent no.1-claimant that the victim sustained 100% functional disablement. Admittedly the victim, at the time of accident, was a mason by profession. The learned Tribunal after taking into consideration the entire aspect has considered the extent of disablement of 80%. To be precise, no evidence has been led from the side of the claimant that he is functionally 100% disabled and/or his mobility or movement has been totally restricted. Nothing has been noted in the disability certificate that the victim cannot travel without the assistance of escort. Such being the position, I do not find any reason to interfere with the extent of disablement of 80% being the extent of loss of earning as considered by the learned Tribunal. Although it has been argued on behalf of the appellant-insurance company that since the doctors who treated the victim or issued disability certificate has not been examined hence the extent of injury is not established and therefore there cannot be any entitlement of future loss of earnings yet in view of injury revealing from the discharge summary and other medical documents such argument does not stand to reason.

17. With regard to the fourth issue of entitlement of medical expenses, it has been vociferously argued on behalf of the appellant-insurance company that the medical expenses have not been properly proved and, therefore, the claimant is not entitled to the same. It is found that the expenses towards medical treatment namely Exhibits-14, 15, 16, 24, 27, 28, 30 and 31 amounting to Rs. 5,82,114/- has been proved by several witnesses of the Medical Institutes where the claimant-injured was treated. From the impugned judgment, it is found that the learned Tribunal has considered those documents and allowed medical expenses of Rs.5,82,114/-. It is relevant to note from the impugned judgment that the insurance company, before the learned Tribunal, did not deny the documents produced at the instance of the claimant towards medical expenses. Therefore, the learned Tribunal has rightly allowed the medical expenses of Rs. 5,82,114/-.

18. The fifth issue relates to multiplier to be adopted. It is found that the learned Tribunal has adopted the multiplier 17. However, since at the time of accident, the victim was 22 years old, following the observation of Hon'ble Supreme Court in Sarla Verma (Smt) and Others versus Delhi Transport Corporation and Another reported in 2009 (6) SCC 121, the multiplier should be 18 instead of 17.

19. With regard to sixth issue relating to entitlement of future prospect, since on the date of accident admittedly the victim was 22 years old and was self-employed, he is entitled to an additional amount equivalent to 40% of the annual

income towards future prospect in view of decision of Hon'ble Supreme Court in Pranay Sethi (supra).

20. Coming to the last issue regarding entitlement towards future medical expenditures, Mr. Banerjee, learned advocate for the respondent-claimant, referring to the decision of Hon'ble Supreme Court in Laxman Alias Laxman Mourya (supra) submitted that the victim since suffered from diffuse axonal injury, hence he is entitled to future medical expenditures of Rs.2,00,000/-. In the case before the Hon'ble Supreme Court, the victim suffered 26% disability in the right lower limb, 25% urethral injury and 38% disability to the whole body and considering the evidence produced by the claimants, the Hon'ble Supreme Court came to the finding that he will not be able to work as a carpenter or do any manual work throughout his life. The facts involved in the aforesaid case is quite dissimilar to the case at hand. The claimant-injured has not produced any evidence of possible future treatment or medical expenditures. Hence, I am not inclined to grant any amount towards future medical expenditures. Be that as it may, the claimant as is appearing from the medical documents sustained brain injuries and had to be treated in several hospitals, therefore, he is entitled to compensation under non-pecuniary damages to the extent of Rs. 1,00,000/-.

21. In view of the above discussion, the calculation of compensation is made hereunder:

Calculation of Compensation

Monthly income

Rs. 5,000/-

Annual income (Rs. 5,000/- x 12)

Rs. 60,000/-

Add: Future prospect @ 40% of the annual income

Rs. 24,000/-

Rs. 84,000/-

80% loss of income due to disablement of 80%

Rs. 67,200/-

Adopting multiplier 18 (Rs. 67,200/- x 18)

Rs. 12,09,600/-

Medical expenses incurred

Rs. 5,82,114/-

Non-pecuniary damages

Rs. 1,00,000/-

Total compensation

Rs. 18,91,714/-

22. Thus, the claimant is entitled to compensation of Rs. 18,91,714/-together with interest at the rate of 6% per annum from the date filing of the claim application till payment. It is informed that the respondent no.1-claimant has not received any compensation amount in terms of order of the learned Tribunal.

23. Accordingly, appellant-insurance company is directed to deposit the entire compensation amount of Rs. 18,91,714/- together with interest as above by way of cheque before the learned Registrar General, High Court, Calcutta, within a period of six weeks from date.

24. Respondent no.1-claimant is directed to deposit ad valorem Court fees on the compensation amount, if not already paid.

25. Upon deposit of the aforesaid amount and the interest indicated, learned Registrar General, High Court, Calcutta shall release the aforesaid amount in favour of the respondent no.1-claimant upon payment of ad valorem Court fees on the compensation amount, if not already paid and upon satisfaction of his identity.

26. The statutory amount of Rs. 25,000/- deposited by the appellant-insurance company vide OD challan no. 483 dated 27th August 2021 be refunded to the insurance company together with accrued interest.

27. With the aforesaid observation, the appeal and the cross-objection stand disposed of. The impugned award and judgment of the learned Tribunal is modified to the above extent. No order as to costs.

28. All connected applications, if any, stand disposed of.

29. Interim order, if any, stands vacated.

30. Urgent photostat certified copy of this judgment, if applied for, be given to the parties upon compliance of necessary legal formalities.